STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 13 EHR 18253

WASCO LLC Petitioner, DYNA-DIGGR LLC Intervenor-Petitioner, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, Respondent.	)	**RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

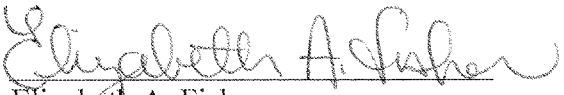
Pursuant to N.C.G.S. § 1A-1, Rule 56, and 26 NCAC 03 .0115(a), Respondent, North Carolina Department of Environment and Natural Resources ("the Department"), Division of Waste Management ("the Division"), through its Hazardous Waste Section ("the Section"), files this Motion for Summary Judgment on all claims raised by Petitioner WASCO LLC ("WASCO") in WASCO's Petition for a Contested Case Hearing. Respondent respectfully moves for a final Order disposing of this case under N.C.G.S. § 150B-34.

A memorandum of law in support of this motion is attached.

Respondent requests oral argument in this matter following the submission of the parties' response and reply briefs.

Respectfully submitted this is the 25th day of September, 2014.

ROY COOPER
Attorney General

By: 

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WASCO LLC Petitioner, DYNA-DIGGR LLC Intervenor-Petitioner, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, Respondent.	**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to N.C.G.S. § 1A-1, Rule 56, and 26 NCAC 03 .0115(a), Respondent, North Carolina Department of Environment and Natural Resources ("the Department"), Division of Waste Management ("the Division"), through its Hazardous Waste Section ("the Section"), files this Memorandum in Support of its Motion for Summary Judgment on all claims raised by Petitioner WASCO LLC ("WASCO")[1] in WASCO's Petition for a Contested Case Hearing.

INTRODUCTION

This case concerns the Section's ongoing efforts to ensure the cleanup of real property with historic soil and groundwater contamination to a level protective of human health and the environment. Summary Judgment is proper because the only genuine issue—WASCO's "operator" liability under the State Hazardous Waste Program—involves a matter of statutory construction, which is a question of law, not fact, and WASCO cannot prove error as a matter of

[1] For ease of reference, "WASCO" shall be used to refer to WASCO LLC and all predecessors in interest, including but not limited to Water Applications & Systems Corporation and United States Filter Corporation.

law under N.C.G.S. § 150B-23(a) in light of 14+ years of evidence supporting the Section's interpretation of the statutes and rules it was created to administer.

As a matter of background, the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k, "is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave." City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331, 128 L. Ed. 2d 302, 307 (1994). The purpose of RCRA is to provide "nationwide protection against the dangers of improper hazardous waste disposal." United States v. Colorado, 990 F.2d 1565, 1569 (10th Cir. 1993), cert. denied, 510 U.S. 1092, 127 L. Ed. 2d 216 (1994) (quotation marks omitted). Congress amended RCRA in 1984 to expand EPA's authority to require corrective action for improperly disposed waste, emphasizing the importance of placing cleanup responsibility on owners **and operators** rather than shifting the burden to the federal Superfund program. See United Technologies Corp. v. U.S. EPA, 821 F.2d 714, 722 (D.C. Cir. 1987).

States may apply for and receive authorization to administer their own programs in lieu of the federal RCRA program as long as the state program (1) is "equivalent to the Federal program," (2) is "consistent with the Federal or State programs applicable in other States," and (3) provides for "adequate enforcement of compliance." RCRA § 3006(b), 42 U.S.C. § 6926(b); 40 C.F.R. § 271.4. The State of North Carolina received initial authorization for the State Hazardous Waste Program in 1984 and has received periodic approval for program revisions, including with regard to corrective action. See generally 49 Fed. Reg. 48694 (Dec. 14, 1984); 59 Fed. Reg. 56000 (Nov. 11, 1994). The "State Hazardous Waste Program" consists of the North Carolina Solid Waste Management Act ("the Act"), contained in Chapter 130A, Article 9 of the North Carolina General Statutes, and the rules promulgated thereunder and codified in

Subchapter 13A of Title 15A of the North Carolina Administrative Code ("the Rules"). Because the State Hazardous Waste Program is federally delegated, EPA continues to exercise oversight to ensure consistency with RCRA. (Ex. P-1). EPA also retains the ability to revoke program authorization.

The Act instructs the Department to "cooperate . . . with . . . the federal government . . . in the formulation and carrying out of a solid waste management program," including a program for the management of hazardous waste "designed to protect the public health, safety, and welfare; [and to] preserve the environment." N.C.G.S. § 130A-294(a)(2), (b). The Act mandates the adoption of rules to implement that program, which the Department "shall enforce." N.C.G.S. § 130A-294(b) (emphasis added). The Rules largely adopt and incorporate the applicable federal regulations by reference. The authority to enforce the State Hazardous Waste Program has been delegated to the Director of the Division. (Ex. P-2). The Director has issued a sub-delegation of this authority to the Chief of the Section. (Ex. P-3).

In general, the State Hazardous Waste Program regulates three different types of owners and/or operators. First, owners and/or operators of active facilities must have operating permits or otherwise follow rules controlling the management of hazardous waste from generation to disposal. See generally 40 C.F.R. §§ 262.10 to 265.1202 and 15A NCAC 13A .0107 to .0110 (governing generators, transporters, and treatment, storage and disposal facilities); 40 C.F.R. §§ 270.1 to 270.320 and 15A NCAC 13A .0113 (governing permitting). Second, owners and/or operators of facilities in the process of shutting down their active businesses must complete a process known as "closure." 40 C.F.R. §§ 264.110 to 264.116 and 265.110 to 265.116 (adopted by reference at 15A NCAC 13A .0109(h) and .0110(g)). If a facility can close without leaving residual contamination, then it exits the State Hazardous Waste Program. Closure requirements

also apply to units of historic contamination discovered onsite, even where an active business continues to operate. Third, when clean closure is not practicable and units of contamination are capped with waste left in place (i.e., closed as landfills), the owners and/or operators of those units are subject to "post-closure" permitting requirements. 40 C.F.R. § 270.1(c) (adopted be reference at 15A NCAC 13A .0113(a)). While WASCO may attempt to distract this Tribunal by arguing that it never fell into the first or second category, and by alleging that other entities did fall into those categories, the third category—post-closure—is the only category at issue.[2]

Post-closure requires permittees to (a) conduct maintenance of the cap overlying the landfill unit; (b) conduct groundwater monitoring and reporting; (c) conduct corrective action associated with the landfill or any other sources of contamination at the facility; and (d) provide up-front financial assurance for the entire projected cleanup costs to prevent the cleanup burden from falling on the people of North Carolina in the event the permittee becomes insolvent or otherwise unable to fulfill its obligations. See generally 40 C.F.R. § 264.117 (adopted by reference at 15A NCAC 13A .0109(h)). In lieu of post-closure permits, owners and/or operators may enter Administrative Orders on Consent ("AOCs") imposing similar requirements. 40 C.F.R. § 270.1(c)(7) (adopted by reference at 15A NCAC 13A .0113(a)).

Here, it is indisputable that a pit on the property at issue once contained an underground storage tank for waste perchloroethylene ("PCE"), a dry cleaning solvent; the pit was closed as a

[2] A post-closure permit consists of two parts. The "Part A" contains facility information including identification of owners, operators, facility contacts, and hazardous waste category such as generator or disposer. 40 C.F.R. § 270.13 (adopted by reference at 15A NCAC 13A .0113(j)). Once a facility provides initial notice of hazardous waste activity and completes a Part A, the facility "shall be treated as having been issued a permit" and is subject to "interim status" requirements under 40 C.F.R. Part 265, including post-closure care associated with the regulated unit (here, the former waste-PCE tank). 40 C.F.R. § 270.70(a)(2) (adopted by reference at 15A NCAC 13A .0113). A facility must submit a comprehensive "Part B" upon request, and the combined permit mandates the facility's compliance with 40 C.F.R. Part 264 (including corrective action for all releases as well as post-closure care of the regulated unit). As the forms have changed over time, references to "Part A" permit applications in this memorandum shall include EPA Form No. 8700-23; EPA Form No. 8700-13 A/B; and combined EPA Form Nos. 8700-12, 8700-13 A/B, and 8700-23.

landfill in 1992 with contaminated soil left in place; significant groundwater contamination remains today; and the Section has authority to require any owner and/or operator of that landfill to obtain a post-closure permit and comply with the requirements of the same. Based on its 14-year course of dealing with WASCO, the Section reasserted in an August 2013 letter that WASCO was regulable as a post-closure operator of that landfill. As a matter of law, liability under the State Hazardous Waste Program is both strict—without regard to causation—and joint and several. Thus, the question for this Tribunal is not whether the Section could have characterized any other persons as post-closure owners and/or operators, but whether the Section's determination **solely as it relates to WASCO's role in the Facility's *post-closure* operations** was reasonable and based on a permissible construction of the applicable portions of the State Hazardous Waste Program. The answer is yes.

STATEMENT OF THE CASE

1. On August 16, 2013, the Section sent the letter that led to the filing of this Contested Case ("the Letter") to WASCO and Dyna-Diggr LLC ("Dyna-Diggr"), the Intervenor and current owner of the Facility, by United States Mail and email. (Ex. A-7). The Letter concerned the requirements of the State Hazardous Waste Program and asserted, in relevant part, that WASCO is an "operator" required to obtain a post-closure permit or AOC in lieu of a post-closure permit under 40 C.F.R. § 270.1(c) (adopted by reference at 15A NCAC 13A .0113(a)).

2. The Letter was a restatement of the Section's longstanding position that WASCO is subject to post-closure "operator" liability, which the Section first asserted in 2004 (Ex. B-13), and that a post-closure permit or AOC is necessary for the Facility, which the Section had formally asserted in five previous letters from December 2009, January 2010, February 2010,

March 2011, and August 2012 (Exs. A-1 to A-5), and through discussions with opposing counsel (Ex. A-6).

3. In the December 2009 letter, the Section called for WASCO to submit a Part B[3] post-closure permit application, citing the requirements of 40 C.F.R. Part 270, adopted by reference in relevant part at 15A NCAC 13A .0113. (Ex. A-1).

4. The Section reiterated its call for WASCO to submit a Part B application for a post-closure permit in January 2010, under the specific authority of 40 C.F.R. § 270.10, adopted by reference at 15A NCAC 13A .0113, and repeated its Part B demand again in February 2010. (Exs. A-2, A-3).

5. In March 2011, the Section proposed issuing an AOC in lieu of a post-closure permit to both WASCO and Dyna-Diggr, citing the Section's authority to require corrective action by owners and operators. (Ex. A-4).

6. Following additional communication with WASCO, the Section issued a letter in August 2012 stating that, "[a]fter a thorough consideration of WASCO's arguments, the [Section] remains unconvinced that WASCO is not a regulated person under RCRA, the Act, and the Rules. Thus, the [Section] cannot withdraw the March 14, 2011 letter." (Ex. A-5).

7. While consistently continuing to assert its position with respect to WASCO's operator liability under the State Hazardous Waste Program leading up to the August 2013 Letter, the Section also weighed its option of requiring Dyna-Diggr to assume post-closure operator responsibilities as an owner of the Facility. (Ex. C-4). The Section ultimately concluded that the most expeditious way forward would be for WASCO and Dyna-Diggr to work out an agreement apportioning post-closure responsibilities amongst themselves, which the Letter stated

[3] See n. 2, supra.

that the Section would honor in a joint AOC in lieu of a post-closure permit. The Letter encouraged both parties to contact the Section "to discuss this proposal further." (Ex. A-7).

8. WASCO filed the Petition for Contested Case Hearing that initiated this proceeding on September 27, 2013, forty-two days after the Letter was sent.

9. The Section moved to dismiss for lack of subject matter jurisdiction and failure to state a claim, alleging that the Letter was not ripe for review and, in any event, the petition was untimely.[4] Administrative Law Judge Beecher Gray denied the motion, finding that the Letter was appealable and finding that any filing deadline was stayed because the Letter did not explain the parties' appeal rights.

10. Dyna-Diggr moved to intervene, and Judge Gray allowed Dyna-Diggr's motion.

STATEMENT OF THE UNDISPUTED FACTS

11. The contested case concerns real property located at 850 Warren Wilson Road, Swannanoa, North Carolina 28778, which is associated with EPA Identification Number NCD 070 619 663 ("the Facility"). (Exs. D, E).

12. Winston Mills, Inc. ("Winston Mills") purchased the Facility in 1976. Winston Mills owned and operated the Asheville Dyeing and Finishing Company ("ADF") onsite as an unincorporated division for the purpose of textile dyeing and finishing. (Exs. E-1, E-2).

13. Based on the discovery of PCE-related contamination emanating from the Facility and continuing offsite, Winston Mills and the Department's predecessor entered into an AOC concerning the Facility in 1990 ("1990 Order"). The 1990 Order also was based on the following allegations:

[4] The Section reiterates the arguments in its Memorandum of Law in Support of Motion to Dismiss Contested Case Petition and Reply in Support of Motion to Dismiss Contested Case Petition and notes that WASCO admitted during discovery that it filed its petition more than 30 days after receiving the August 2013 Letter. (Ex. J).

- Underground storage tanks for raw material PCE and waste PCE had been utilized as part of a dry cleaning process by a prior owner or operator of the Facility;
- In addition to contamination from the tanks, a solvent spill of primarily PCE occurred in approximately 1976 but prior to Winston Mills' ownership of the Facility;
- Most of the spilled solvent entered the ground but some discharged to Bee Tree Creek through an 8-inch drain pipe;
- Sampling in 1988 detected the presence of additional volatile organic compounds including acetone and methylene chloride; and
- The soil contamination amounted to the disposal of listed hazardous waste or the presence of hazardous constituents that made the facility subject to regulation.

Based on the statutes, rules, and regulations associated with the State Hazardous Waste Program, the 1990 Order designated the waste-PCE tank as a regulated unit. (Ex. F-1).

14. Through an environmental consultant, Winston Mills excavated the former waste-PCE tank pit and removed associated piping but was unable to achieve "clean closure." Accordingly, the former waste tank was closed as a landfill with waste in place. Closure was certified on December 11, 1992 and accepted by the Division's predecessor on March 10, 1993, after which time post-closure care began. (See, e.g., Exs. F-2 to F-6).

15. A parent of Winston Mills, McGregor Corporation ("McGregor"), sold the Facility, including the ADF business, to the newly formed Anvil Knitwear, Inc. ("Anvil") in 1995. At that time, Astrum International Corporation ("Astrum") was a parent of both McGregor and Winston Mills. (Ex. E-3; Exs. G-1, G-2).

16. As part of the sale in the preceding paragraph, Culligan International Company ("Culligan"), another subsidiary of Astrum, purchased an equity ownership interest in Anvil in the form of stock valued at $9 million. Culligan also received $9 million in exchange for acting as the primary guarantor of "all of the Sellers' obligations of any kind or nature under Article 9 of the Purchase Agreement," subject to certain limitations. The obligations under Article 9 of the

Purchase Agreement included "Environmental Requirements" associated with the Facility. (Exs. G-1, G-2, G-3).

17. A combination air sparge and soil vapor extraction remediation system was installed at the Facility between 1997 and 1998 to treat onsite groundwater contamination caused by the tanks. (See, e.g., Ex. I-1 at 535).

18. A Part A[5] permit application submitted to the Section in 1999 identified Culligan as the Facility's "operator" instead of Winston Mills. Anvil also signed the Part A permit application as the Facility's owner. (Ex. F-7 at 304).

19. United States Filter Corporation acquired Culligan in 1998. United States Filter Corporation later changed its name to Water Applications & Systems Corporation and then WASCO LLC ("WASCO"). (Exs. G-3, B-5, D-4 at 231).

20. As a parent of Culligan, WASCO supplied post-closure financial assurance to the Section on Culligan's behalf in the form of a $350,000.00 Certificate of Insurance for Closure or Post-Closure Care at the Facility in 1999. The Certificate of Insurance for Closure or Post-Closure Care stated that it was for the purpose of compliance with Subpart H of 40 C.F.R. Parts 264 and 265 (which impose financial assurance requirements on post-closure owners and/or operators). (Ex. H-1).

21. WASCO met with the Section in 1999 concerning the Facility and then followed-up with a request for a compliance status update, which the Section provided. (Exs. B-1, B-2, B-3). WASCO represented to the Section that it intended to pursue "a good faith approach in the continued remediation of the [Facility]," including to address offsite and deep aquifer contamination, to identify sources of contamination, to pursue an agreement with the Section for corrective action, to comply with financial assurance. (Ex. B-4). A Vice President for a WASCO

[5] See n. 2, supra.

subsidiary reiterated that WASCO intended to "ensure that [it] maintains its good standing with the [Section]." (Ex. B-5).

22. An environmental consultant submitted a Revised Groundwater Sampling and Analysis Plan for the Facility on WASCO's behalf, and the Section provided comments directly to WASCO. (Exs. B-6, B-7).

23. In 2000, Culligan provided a draft AOC to the Section which listed Jason Pontnack, an Environmental Manager for WASCO, as the primary contact. (Ex. B-8). Pontnack and John Coyne ("Coyne"), also representing WASCO, attended a follow-up meeting with the Section concerning the AOC. (Ex. B-9).

24. Additional post-closure activities at the Facility during Culligan's ownership included the 2001 installation of a second air sparge and soil vapor extraction remediation system and the operation of that system. (See, e.g., Ex. I-1 at 535).

25. A 2001 fax to the Section referenced "the project that [WASCO] is doing at the Asheville Dyeing & Finishing facility." (Ex. H-8). A representative of WASCO, Brian Clarke ("Clarke"), attended another meeting with the Section concerning the Facility in 2003, and an environmental consultant copied Clarke on a follow-up email to the Section. (Exs. B-10, B-11).

26. WASCO provided updated financial assurance instruments to the Section five times during its ownership of Culligan, including transitioning from a Certificate of Insurance to an **Irrevocable** Standby Letter of Credit and Standby Trust Fund in 2003, and communicated directly with the Section in these matters. (Ex. H-1 to H-15). The Trust Agreement referenced "certain regulations applicable to [WASCO], requiring that an **owner or operator** of a hazardous waste management facility shall provide assurance that funds will be available when needed for . . post-closure care of facility." (Ex. H-13). It stated that the Trust Agreement was

irrevocable, that the Trust Fund was "for the benefit of" the Department, and that the Department had authority to direct the Trustee to make payments from the Trust Fund. (Id.). Similarly, the **Irrevocable** Standby Letter of Credit was established in the Division's favor, was subject to automatic annual renewal by the bank, and was worded for compliance with 40 C.F.R. § 264.151(d) (which applies to post-closure owners and/or operators). (Ex. H-14).

27. EPA Region 4 and the Section conducted a RCRA Facility Assessment ("RFA") at the Facility in 2004 to evaluate whether additional corrective action was needed. The RFA identified 23 solid waste management units ("SWMUs") and one Area of Concern. The RFA recommended further assessment for 5 of the SWMUs and the Area of Concern. (Ex. F-8).

28. Veolia Environnement, SA, a French parent of WASCO, sold the Culligan Group, including Culligan International Company, for $610 million in September 2004. (Ex. G-4). The sale included a Stock Purchase Agreement in which WASCO agreed to indemnify Culligan's buyer "as to certain matters associated at the Facility as they relate to specific Culligan obligations." (Ex. G-5; Ex. I-21 at 699).[6]

29. After the sale of Culligan, WASCO entered into a Master Consulting Services Agreement with Mineral Springs Environmental, P.C. ("Mineral Springs") for Mineral Springs to perform work at the Facility. Coyne signed the contract for WASCO as WASCO's Director of Environmental Affairs. (Ex. K).

30. Robert LaBoube ("LaBoube"), who was Culligan's Environmental, Health & Safety Director, represented in an October 2004 letter to the Section that WASCO was

[6] See also Bond v. Veolia Water Indianapolis, LLC, 571 F. Supp. 2d 905 (S.D. Ind. 2008) ("Veolia North America's sole member is another limited liability company, Veolia Water America, LLC, whose sole member is yet another limited liability company, WASCO, LLC. WASCO has only one member, Veolia Environnement North America Operations, Inc., which is a Delaware corporation with its principal place of business in Delaware. That Delaware corporation's parent company is Veolia Environnement, SA, whose stock is traded publicly on Euronext Paris and on the New York Stock Exchange.").

"assuming responsibility" for the Facility. The letter indicated that copies were transmitted to Coyne and Clarke for WASCO. (Ex. B-12).

31. The Section followed-up with Coyne by email based on Culligan's representation that WASCO "is now responsible for RCRA issues" at the Facility—which the Section expressly referenced—and asked for WASCO to complete a new Part A permit application as operator. (Ex. B-13).

32. Coyne emailed LaBoube and Kirk Pollard ("Pollard"), a professional geologist for Mineral Springs, that same day and asked for "current versions" of the Part A "to work off of," and thanked Pollard when Pollard indicated that he would prepare a new Part A. (Ex. L-2).

33. An updated Part A permit application was submitted to the Section in December 2004 naming WASCO as operator. Coyne signed the Part A permit application for WASCO "under penalty of law" as to the truth of its contents. Anvil signed the same Part A as owner. (Ex. D-1; Ex. J).

34. Another Part A permit application naming WASCO as operator was submitted to the Section in 2006 and signed by Coyne "under penalty of law" as to the truth of the form's contents. Anvil signed the same Part A as owner. (Ex. D-2; Ex. J).

35. Rodney Huerter ("Huerter") became WASCO's Director of Environmental Affairs in 2006. (Ex. H-22).

36. In April 2007, the Section requested that WASCO develop a work plan to investigate the five SWMUs and the Area of Concern identified in the RFA. The Section's letter also called for additional groundwater assessment activities under 40 C.F.R. § 265.93(d)(4), adopted by reference at 15A NCAC 13A .110(f) (which applies to "an owner **or operator**"). (Ex. B-19).

37. In an email concerning the Section's April 2007 request, Coyne represented to Huerter that "[w]e have been prepared to negotiate the RFA work for some time. It is no surprise," and that WASCO had already budgeted "further SWMU/HWMU investigation." (Ex. L-12).

38. WASCO ultimately agreed to a limited investigation of a French drain and a former dump site known as SWMU 14. Mineral Springs submitted a work plan to the Section on behalf of WASCO in July 2007, which the Section only conditionally approved because the work plan did not address all of the Section's enumerated assessment items. (Exs. I-14, B-21).

39. Mineral Springs and/or its sub-contractors performed the French drain and SWMU 14 investigation and submitted an Assessment Report to the Section in October 2008. (Ex. I-21). Before drafting the Assessment Report, Pollard notified Huerter of preliminary findings concerning the volume and nature of drums discovered—including water in at least one drum that tested at a pH of 14, which is considered hazardous based on corrosivity; Pollard's concern for health and safety; his recommendation that Huerter notify the Section; and his belief that an immediate response and a more thorough evaluation could be necessary. (Ex. L-23).

40. Huerter instructed Pollard: "Do not remove any of the drums, containers, or anything else from where you find them." (Id.). Huerter demanded to conduct an "advanced review" of the SWMU 14 Assessment Report (referred to at the time as a Site Conceptual Model Report); provided comments via email on Pollard's first draft; and provided Pollard with two "reviewed and revised blackline document[s]" in response to Pollard's second draft, which reflected significant changes. (Exs. L-27, L-32; and compare L-31, L-37 with L-39, L-40). Huerter noted that "the red-line was getting a little [too] busy to effectively work with." (L-39). Huerter demanded to review any other changes prior to the submission of the report to the

Section. (Id.). The final report presented the opposite of Pollard's initial conclusion to the Section—that further investigation was unwarranted—and made no mention of the corrosively hazardous wastewater. (Ex. I-21).

41. An incomplete set of 51 invoices from Mineral Springs shows that Mineral Springs or its subcontractors performed a variety of post-closure activities related to the Facility between November 2004 and August 2013, which fell into the following categories:

- Groundwater Remediation O&M Program, including a subcontractor for supplies such as air filters, oil filters, oil, and separators;
- Semi-Annual and Quarterly Remediation Effectiveness Sampling, including laboratory subcontractors;
- Quarterly and Semi-Annual Report Preparation;
- Project Management;
- Dump Area and French Drain Assessment Activities, including an excavation subcontractor (work included HazCat technician, 2 pickup trucks, 12-foot emergency response trailer, 500-Gallon vacuum tanker with pressure washer, Tyvek suits, respirators, and 12 HazCat kits), and a bush hog subcontractor; and
- Progress Energy (now Duke Energy) utility bills based one meter labeled as "pump" and one meter labeled as "environmental cleanup."

(Ex. M).

42. The limited invoices provided by WASCO confirm that Coyne or Huerter[7] personally approved payment for the work in the preceding paragraph, totaling at least $225,927.03. (Id.).

[7] While the record reflects that Coyne and Huerter also held or continue to hold positions with Veolia Water North America, a subsidiary/grandchild of WASCO, see Bond v. Veolia Water Indianapolis, LLC, 571 F. Supp. 2d 905, 907 (S.D. Ind. 2008), WASCO has admitted that Coyne and Huerter were acting as WASCO's Directors of Environmental Affairs and "duly authorized agent[s] or employee[s]" when signing and submitting Part As, and the attached exhibits show that the actions cited throughout this motion were taken on WASCO's behalf rather than Veolia's, (see, e.g., Ex. J (Admissions Nos. 1-3, 5, 9-10, 12, 15-17, 19); Ex. K (Master Consulting Services Agreement between Mineral Springs and WASCO); Ex. B (reflecting Coyne and Huerter's negotiations with the Section concerning WASCO's liability); Ex. I (reports addressed to Huerter/Coyne but on behalf of WASCO)); and see United States v. Bestfoods, 524 U.S. 51, 69, 141 L. Ed. 2d 43, 61 (1998) ("[D]irectors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." (quotation marks omitted)).

43. Coyne or Huerter approved an additional $10,057.40 between December 2005 and November 2007 as payment for "pump" and "environmental cleanup" utility bills addressed directly to their attention for "Asheville [Dyeing] and Finishing." (Ex. N).

44. Internal communications between Coyne, Huerter, and Pollard reflect WASCO's involvement in and exercise of oversight over Mineral Springs's work concerning the Facility, including the following examples:

- Pollard's provision of draft documents to Coyne and Huerter for review (see generally Ex. L);
- Comments and edits from Huerter on Pollard's drafts (id.);
- Pollard's requests for Huerter's guidance or authorization on matters related to the Facility, including changes to a Part A form, communications with Anvil and a potential buyer, whether groundwater sampling should continue, and whether to advise the Section about the sale of the Facility (Exs. L-21, L-22, L-25, L-34);
- Pollard's practice of copying Huerter on communications with the Section or forwarding such communications to Huerter (Exs. B-20, B-24, B-27, B-30, L-17, L-25, L-26, L-42); and
- Huerter's request for copies of utility bills to compare with Mineral Springs's invoices, and his request for annual cost projections (Exs. L-9, L-24, L-41).

45. Further internal WASCO communications acknowledged "the statutory / regulatory requirements relating to one of our environmental legacy sites in Swannanoa, NC." (Ex. H-32, H-36, H-40).

46. Mineral Springs submitted at least 33 reports associated with the invoiced post-closure activities to the Section on WASCO's behalf between February 2005 and May 2013, including 16 groundwater monitoring reports that expressly identified WASCO as the "responsible party for the site." (Ex. I).

47. Moreover, the Section communicated directly with WASCO rather than Mineral Springs, or with both entities, in numerous matters related to environmental compliance, including but not limited to requests for assessment work and responses to Mineral Springs's monitoring reports. (See generally Ex. B).

48. WASCO has provided the Section with ten updated Irrevocable Standby Letters of Credit between the 2004 sale of Culligan and 2013, and has communicated directly with the Section during this time period concerning financial requirements for the Facility. (See generally Ex. H).

49. The Section further characterized WASCO as the "current responsible party" in eight RCRA Inspection Reports between June 2006 and July 2013. Each inspection report indicates that a copy was transmitted to WASCO. (Ex. O). Kirk Pollard participated in five of those inspections via telephone (Exs. O-1, O-2, O-4, O-8, O-9). The Section also issued a Notice of Violation to WASCO in 2006 because hazardous waste training records for personnel operating the groundwater remediation systems were not maintained onsite, and because a copy of the post-closure cost estimate was not maintained onsite. (Ex. O-2). The Facility returned to compliance after records were provided to the Section. (Ex. O-3).

50. Dyna-Diggr purchased the Facility from Anvil in December 2007. A letter to the Section dated March 5, 2008 from attorney Howard Grubbs, presumably on behalf of Anvil, represented that WASCO remained "the current site operator" following the sale of the Facility to Dyna-Diggr. (Ex. E-4; Ex. C-1).

51. After the sale, another Part A permit application was submitted to the Section in April 2008, identifying Dyna-Diggr as the Facility's owner and continuing to identify WASCO as the Facility's operator. Mineral Springs submitted a correction to the April 2008 Part A to the Section, clarifying that the Facility was a "Treater, Storer, or Disposer of Hazardous Waste." The April 2008 Part A was signed by Huerter "under penalty of law" as to the truth of its contents. (Exs. D-3, D-4; Ex. J).

52. Part A forms submitted to the Section in April 2010 and January 2012 identified Loren Lanter (Manager of Dyna-Diggr) as both an "owner" and an "operator" of the Facility, but the forms were prepared by Donald Lee ("Lee"), as Safety Director for another corporation called Brisco Inc. (Exs. C-2, C-3). Dyna-Diggr has denied that Lee was acting as its duly authorized agent or employee in submitting the forms. (Ex. C-5).

53. Following Dyna-Diggr's December 2007 purchase of the Facility, WASCO has continued and continues to maintain the Facility's financial assurance (Ex. H), to pay for remediation costs including sampling and reporting (Ex. M), to allow Mineral Springs to submit reports to the Section on WASCO's behalf (Ex. I), and to exercise oversight over Mineral Springs's work (Ex. L). The post-closure financial assurance supplied by WASCO currently consists of a $443,769.88 Irrevocable Standby Letter of Credit and a Standby Trust Fund. (Exs. H-13, H-14, H-55).

54. The most recent groundwater sampling data provided to the Section (January 2013) reflects ongoing PCE contamination at concentrations roughly 50 to 150 times higher than the water quality standards contained in 15A NCAC 2L .0202 ("the 2L Standards"). The groundwater contamination associated with the Facility extends off-site. (Ex. I-34 at 799-800).

ISSUES

I. Has WASCO failed to raise any genuine issue of material fact related to the Section's classification of WASCO as a post-closure "operator" for purposes of the State Hazardous Waste Program, considering that issues of statutory construction are questions of law?

II. Is the Section entitled to judgment as a matter of law, considering that WASCO cannot meet its burden of proving that the Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in interpreting the statutes and rules it was created to administer?

III. As a matter of law, does WASCO's petition raise claims not redressable by this Court?

STANDARD OF REVIEW

Summary judgment is proper under Rule 56 of the North Carolina Rules of Civil Procedure if "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56. The North Carolina Rules of Civil Procedure apply to proceedings in the Office of Administrative Hearings ("OAH") unless otherwise specified. 26 NCAC 03 .0101(b). The purpose of summary judgment is "to bring litigation to an early decision on the merits without the delay and expense of a trial," including "where only a question of law on the indisputable facts is in controversy." McNair v. Boyette, 282 N.C. 230, 234-35, 192 S.E.2d 457, 460 (1972).

A motion for summary judgment prior to the completion of discovery is proper where the party seeking additional discovery has "failed to show [that] further discovery would lead to the production of relevant evidence." Stott v. Nationwide Mut. Ins. Co., 183 N.C. App. 46, 55, 643 S.E.2d 653, 659, disc. rev. denied, 361 N.C. 703, 653 S.E.2d 876 (2007); see also Vaglio v. Town & Campus Int'l, Inc., 71 N.C. App. 250, 255, 322 S.E.2d 3, 6 (1984) (allowing additional discovery "presupposes that any information gleaned will be useful"); Cellu Products Co. v. G.T.E. Products Corp., 81 N.C. App. 474, 477, 344 S.E.2d 566, 567-68 (1986) (upholding trial court's summary judgment ruling where the opposing party was not prejudiced by the missing information).[8]

When ruling on a summary judgment motion, a court must view the evidence "in the light most favorable to the nonmoving party." Richardson v. Bank of Am., N.A., 182 N.C. App. 531, 539, 643 S.E.2d 410, 416, appeal dismissed, 362 N.C. 227 (2007). The party moving for

[8] Here, WASCO has been overzealous in pursuing discovery. The Section has responded to 212 Requests for Admission, 2 sets of Requests for Production of Documents, and 1 set of Interrogatories; provided access to its public file; and further produced handwritten notes, financial records, drafts, and over 11,000 pages of emails. These documents are the best evidence of WASCO's conduct in dealing with the Section and the Facility. As demonstrated infra, depositions would be unhelpful to WASCO while exposing the Section to additional delay and expense.

summary judgment has the initial burden of showing a lack of a triable issue of fact. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). The moving party may meet this burden by showing "that an essential element of the opposing party's claim is nonexistent," or that the opposing party will be unable to produce evidence to support an essential element of the claim. Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quotation marks omitted).

Once a moving party meets its burden, the burden shifts to the non-movant to "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." Id. (quotation marks omitted). In order to meet its burden, a non-movant cannot create a genuine issue of material fact by resting upon the mere allegations or denials contained in its pleadings. N.C.G.S. § 1A-1, Rule 56(e). An issue is material only "if its resolution would prevent the party against whom it is resolved from prevailing." Bone Int'l, Inc. v. Brooks, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981) (quotation marks omitted).

ARGUMENT

I. THERE IS NO GENUINE ISSUE OF MATERIAL FACT BECAUSE THE ONLY DISPUTE INVOLVES A MATTER OF STATUTORY CONSTRUCTION, WHICH IS A QUESTION OF LAW.

The Section's authority to require any owner and/or operator of the Facility's former waste-PCE tank, which was closed as a landfill, to obtain a post-closure permit is beyond dispute, as is the nature and scope of WASCO's involvement in the Facility's post-closure operations. The question of whether the undisputed facts related to WASCO's involvement support the Section's characterization of WASCO as an "operator" is a matter of law. To the extent WASCO may claim that other persons are regulable as owners and/or operators, such

questions are not material to the outcome of this case, as liability under the State Hazardous Waste Program is both strict and joint and several.

A. The Section Has Authority to Require any Owner and/or Operator of the Landfill to Obtain a Post-Closure Permit or AOC.

It is beyond dispute that (1) the site of the former waste-PCE tank was closed as a landfill with hazardous waste left in place, triggering the Section's post-closure jurisdiction, and (2) the Facility remains subject to the Section's authority to require any owner and/or operator of that landfill to obtain a post-closure permit or enforceable document in lieu of a permit.

Pursuant to 40 C.F.R. § 270.1(c) and 15A NCAC 13A .0113(a), "[o]wners and operators" of "landfills . . . that received waste after [January 26, 1983], or that certified closure (according to § 265.115 of this chapter) after January 26, 1983," must obtain post-closure permits or enforceable documents in lieu of post-closure permits, "unless they demonstrate closure by removal or decontamination." If a tank or tank system is closed with waste in place, such unit "is then considered to be a landfill" for purposes of post-closure and associated corrective action requirements. 40 C.F.R. § 265.197(b) (adopted by reference at 15A NCAC 13A .0110(j)).

First, a 1992 Closure Certification Report reflects that the former waste-PCE tank was closed as a landfill with hazardous waste left in place, making the Facility subject to post-closure. (Ex. F-3; see also Ex. F-1 (1990 Order providing background on the former waste-PCE tank); Ex. F-2 (1992 Plat noting land use restrictions under 40 C.F.R. Part 265, Subpart G); Ex. F-4 (Letter accepting Closure Certification subject to post-closure); Ex. F-6 (1993 Deed Notice indicating that a "495.4 square foot portion of this land has been used to manage hazardous waste" and "[t]he property is currently known to contain residual amounts of volatile organic compounds"); and Ex. F-5 (first post-closure groundwater monitoring report)). Thus, as a matter of law, the closure of the former waste-PCE tank triggered the Section's authority to

regulate the Facility under the post-closure permitting requirements. 40 C.F.R. § 270.1(c) (adopted by reference at 15A NCAC .0113(a)).

Second, it is beyond dispute that the Facility remains subject to post-closure. The most recent groundwater sampling data made available to the Section (January 2013) reflected ongoing PCE contamination at concentrations roughly 50 to 150 times higher than the 2L Standards. (Ex. I-34 at 799-800). WASCO has even admitted that it "does not contest the Division's authority to require corrective action by an owner or operator." (Petition at 4). Accordingly, the question of whether the Facility is subject to post-closure is not at issue in the instant litigation.

B. WASCO's Post-Closure Operator Liability Is a Question of Law.

WASCO does not or cannot properly contest the facts asserted by the Section as relevant to its classification of WASCO as an "operator" subject to regulation but, instead, merely disputes the legal conclusions that the Section has drawn from those facts.

It is well-settled that "[a] question of statutory interpretation is ultimately a question of law for the courts." Oxendine v. TWL, Inc., 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007) (quoting Brown v. Flowe, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)); and see *In re* Estate of Pope, 192 N.C. App. 321, 329, 666 S.E.2d 140, 147 (2008), disc. rev. denied, 363 N.C. 126, 673 S.E.2d 129 (2009) (distinguishing "issues of material fact" from "issues requiring the application of law to the facts").

Courts from other jurisdictions have granted summary judgment in environmental cases on issues of liability, including the question of operatorship. See, e.g., United States v. Power Eng'g Co., 125 F. Supp. 2d 1050, 1071 (D. Colo. 2000) (granting summary judgment to United States on claim that Defendant was a RCRA operator), aff'd, 303 F.3d 1232 (10th Cir. 2002);

Sierra Club v. Utah Solid & Hazardous Waste Control Bd., 964 P.2d 335, 344 (Utah Ct. App. 1998) ("Whether EG&G is an 'operator' within the meaning of [Utah's hazardous waste law]—and therefore required to obtain a permit—is an issue of statutory construction.").

The essence of the argument in WASCO's contested case petition is that the Section has made demands that "wrongfully subject WASCO to liabilities under applicable law due to the fact that WASCO never owned or operated the [Facility] or had any authority to control operations at the [Facility]." (Petition at 2). WASCO makes this argument by disputing the applicable definition of "operator"; by disputing the applicability of the Bestfoods standard discussed in Issue II(C); and by claiming that the Section "has failed to evaluate and apply the elements necessary for it to make a proper determination" as to the question of operator liability. (Id. at 3-4). Therefore, WASCO's own contested case petition makes it clear that the present dispute involves only a question of law.

C. Matters Unrelated to WASCO's Involvement with the Facility Cannot Create Material Issues of Fact.

Because the State Hazardous Waste Program provides for joint and several liability and strict liability, any questions of fact concerning the current or former role of other entities at the Facility, including with regard to the cause of any contamination, are not material to the outcome of this case.

First, as a matter of law, the State Hazardous Waste Program provides for strict liability in enforcement matters, without regard to causation. EPA has taken this position through guidance documents and administrative proceedings. See, e.g., RO[9] 11005 (Nov. 18, 1980) (stating that a company is liable for hazardous waste generated by its independent contractors and subcontractors related to painting, janitorial services, boiler cleaning, and construction); In re

[9]Citations to "RO" refer to documents contained in the RCRA Online database, maintained by EPA at http://www.epa.gov/epawaste/inforesources/online/index.htm.

Rybond, Inc., 6 E.A.D. 614, 638 (1996) (rejecting argument that an owner should not be held liable under RCRA because it was unaware that its lessee was storing hazardous waste on the property); In re: Pyramid Chemical Co., 11 E.A.D. 657, 677 (2004) (stating that a facility owner "cannot avoid its responsibility by blaming its contractor").

Federal courts have upheld EPA's interpretation. United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 738 (8th Cir. 1986), cert. denied, 484 U.S. 848, 98 L. Ed. 2d 102 (1987) (agreeing that RCRA imposes strict liability, including for acts of disposal that occurred before RCRA became effective); United States v. Production Plated Plastics, Inc., 742 F. Supp. 956, 960 (W.D. Mich. 1990) ("RCRA is a remedial strict liability statute which is construed liberally."), aff'd, 955 F.2d 45 (6th Cir. 1992); United States v. Domestic Indus., Inc., 32 F. Supp. 2d 855, 866-67 (E.D. Va. 1999); United States v. Liviola, 605 F. Supp. 96, 100 (N.D. Ohio 1985).

Second, as a matter of law, RCRA provides for joint and several liability. RO No. 11005 (stating that, where a company hires a contractor and the contractor hires a subcontractor, EPA "will reserve the right, however, to hold both or all three parties liable for these responsibilities in any enforcement actions we might take as a result of a violation of the regulations") (citing 45 Fed. Reg. 72024, 72026-72027 (Oct. 30, 1980) and 45 Fed. Reg. 33153, 33169 (May 19, 1980)); RO 12703 (August 1986) ("EPA considers both the owner (or owners) and operator of a facility to be responsible for regulatory compliance. For this reason, EPA may initiate an enforcement action against either the owner, the operator, or both."). Joint and several liability is consistent with EPA's need "to gain compliance as quickly as possible" in order "to protect human health and the environment." 45 Fed. Reg. at 33169.

Federal courts have upheld this interpretation. See United States v. Envtl. Waste Control, Inc., 710 F. Supp. 1172, 1201-04 (N.D. Ind. 1989) ("[I]t is difficult to believe that if three persons operated a hazardous waste facility as a joint venture on property owned by four other persons, only two of the persons (one as owner, another as an operator) could be liable for civil penalties under Section 3008 of RCRA." (quotation marks omitted)), aff'd, 917 F.2d 327 (7th Cir. 1990), cert. denied, 499 U.S. 975, 113 L. Ed. 2d 719 (1991); United States v. Conservation Chem. Co. of Ill., Inc., 733 F. Supp. 1215, 1221 (N.D. Ind. 1989) ("a hazardous waste facility may indeed have more than one operator for RCRA purposes").

As a condition of maintaining authorization for the State Hazardous Waste Program, the Section is bound by EPA's interpretations regarding strict liability and joint and several liability. See RCRA § 3006(b), 42 U.S.C. § 6926(b); 42 C.F.R. § 271.4; and see (Ex. P-1 at 1154 (Memorandum of Agreement containing the Department's pledge to "conduct its hazardous waste program equivalently with EPA program policies and guidance")).

While WASCO has attempted to manufacture a factual dispute by representing in its petition that the Section has admitted that Dyna-Diggr is "the sole responsible party" for post-closure (Petition at 4), it is clear from the record that (1) the Section has consistently maintained that WASCO is an operator of the Facility (Ex. A), (2) the quoted language was part of an unexecuted **draft** AOC prepared by the Section in a good-faith attempt to facilitate an expeditious cleanup of the Facility (Ex. C-4), (3) no agreement was reached on any AOC prior to the August 2013 Letter that led to WASCO's petition (Ex. A-7), and (4) the Section has never released WASCO of liability (id.). Thus, WASCO's claim is based on "the mere allegations" contained in its petition and cannot create a genuine issue of material fact. N.C.G.S. § 1A-1, Rule 56(e).

Because liability under the State Hazardous Waste Program is both strict and joint and several, it is immaterial whether Dyna-Diggr, Huerter in his personal capacity, Veolia, or any other person could also now be characterized as a post-closure owner and/or operator; and whether other persons such as Anvil or Winston Mills operated active businesses or disposed of hazardous waste at the Facility now or at various points in the past. The only proper issue is whether the Section reasonably characterized WASCO as a post-closure operator based on WASCO's involvement with the Facility.

II. THE SECTION IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE EVIDENCE SUPPORTS ITS INTERPRETATION OF THE STATUTES AND RULES IT WAS CREATED TO ADMINISTER AND WASCO CANNOT PROVE ERROR UNDER N.C.G.S. § 150B-23(a).

A unanimous opinion of the Supreme Court, EPA guidance, case law from other jurisdictions, and the undisputed facts related to WASCO's 14-plus years of involvement with the Facility support the Section's characterization of WASCO as a post-closure operator. Because the Section acted reasonably and based on a permissible construction of the State Hazardous Waste Program, its interpretation is entitled to judicial deference. Accordingly, WASCO cannot meet its burden of proving that the Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in interpreting the statutes and rules it was created to administer, and the Section is entitled to judgment as a matter of law.

A. The North Carolina Administrative Procedure Act ("NCAPA") Entitles the Section to a Presumption of Good Faith.

The NCAPA states that "[t]he administrative law judge shall decide [each] case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of

the agency." N.C.G.S. § 150B-34(a). Under the NCAPA, "[i]t is well settled that absent evidence to the contrary, it will always be presumed 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.'" Strickland v. Hedrick, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (quoting Leete v. County of Warren, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995)). The presumption of good faith "'places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence." Id. Accordingly, the Section's interpretation of the statutes and rules it was created to administer is entitled to judicial deference "[as] long as the agency's interpretation is reasonable and based on a permissible construction" of the applicable law and is not clearly erroneous. Cashwell v. Dep't of State Treasurer, Ret. Sys. Div., 196 N.C. App. 80, 89, 675 S.E.2d 73, 78 (2009) (quotation marks omitted).

Substantively, a Petitioner can only prevail on a claim under the NCAPA if the Petitioner meets its burden of proving that the Respondent agency

> has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency (1) Exceeded its authority or jurisdiction; (2) Acted erroneously; (3) Failed to use proper procedure; (4) Acted arbitrarily or capriciously; or (5) Failed to act as required by law or rule.

N.C.G.S. § 150B-23(a) (emphasis added). Arbitrary or capricious conduct is conduct that "is patently in bad faith," or so "whimsical" as to reflect "a lack of fair and careful consideration" or a failure to indicate "any course of reasoning and the exercise of judgment." Mann Media, Inc. v. Randolph County Planning Bd., 356 N.C. 1, 16, 565 S.E.2d 9, 19 (2002) (quotation marks omitted).

In light of the above, as long as the Section acted reasonably in classifying WASCO as an operator, its assertion is entitled to judicial deference, even if this Court might have classified WASCO differently in the first instance.

B. The Section's Characterization of WASCO as an Operator Is Consistent with Longstanding EPA Guidance.

Because this case is based on the August 2013 Letter, the question of WASCO's operatorship must always be viewed through the lens of post-closure. In general, an "operator" is "the person responsible for the overall operation of a facility." 40 C.F.R. § 260.10 (adopted by reference at 15A NCAC 13A .0102(b)). This definition applies to 40 C.F.R. Parts 264 and 265, which contain the substantive regulations regarding post-closure care and corrective action. In the context of the permitting requirements in 40 C.F.R. Part 270, an even broader definition applies—the "operator of any facility or activity subject to regulation under RCRA." 40 C.F.R § 270.2 (emphasis added) (adopted by reference at 15A NCAC 13A .0113(a)). These definitions must be construed *in pari materia* with the requirement in 40 C.F.R. § 270.1(c) (adopted by reference in 15A NCAC 13A .0113(a)) for "operators of . . . landfills" to obtain post-closure permits.

It is well-settled that "the owner of the land, the owner of the structures and the operator may all three be different persons or companies." 45 Fed. Reg. 33153, 33169 (May 19, 1980). While operatorship requires a case-by-case analysis, EPA has stated that any entity with "considerable autonomy to make [major] decisions without [the owner's] involvement . . . could be considered the operator." RO 12174 (Jan. 27, 1984). EPA further specified that it is proper for an entity to sign a permit as an operator when that entity is "responsible or partially responsible for the operation, management or oversight of **hazardous waste activities** at the facility." RO 12952 (Jun. 24, 1987) (emphasis added).

Moreover, it is well-settled that an entity may assume operator responsibilities by third-party agreement. EPA has stated that, when an owner hires an outside contractor to perform services at a facility (similar to WASCO's involvement vis-à-vis Anvil) and that contractor hires a subcontractor (similar to WASCO's contract with Mineral Springs)—"We do not object to and, in fact, prefer that only one of these parties, by mutual agreement (e.g., a contract) perform these [regulatory] responsibilities in fact." RO 11005 (Nov. 18, 1980). Regardless of the contents of such third-party agreements, when an entity informs EPA that it is "assum[ing] and perform[ing] the [regulatory] duties . . . on behalf of all of the parties," then "the Agency will look to that designated party" for compliance. 45 Fed. Reg. 72024, 72026-27 (Oct. 30, 1980) (emphasis added); and see 45 Fed. Reg. at 33295 (stating that, when ownership and operatorship are split, "the operator is responsible for obtaining a permit and complying with it.").

The Eastern District of Wisconsin validated this approach, concluding that, although a regulated owner would be "preclude[d] . . . from *eliminating* liability through a liability transfer agreement," such entity is "not preclude[d] . . . from *creating* additional liability" by entering an agreement with an otherwise non-liable party for that party "to take on direct liability [as an operator] *in addition* to that of the already-liable party." United States v. NCR Corp., 840 F. Supp. 2d 1093, 1097 (E.D. Wis. 2011), rev'd on other grounds on reconsideration, 840 F. Supp. 2d 1093 (E.D. Wis. 2012).

Environmental liability transfer is an increasingly big business, making situations similar to WASCO's involvement with the Facility increasingly common throughout the country and underscoring the magnitude of the problem if non-owning operators could choose whether and when to walk away. See, e.g., Laura Bloodgood, *International Markets for Environmental Insurance*, USITC Publication 3794, 2005 ITC LEXIS 676, 19-20 (July 2005) (describing

liability transfer as an "emerging strategy to transfer environmental risk" and citing the Wisconsin Department of Natural Resources' regulation of the transferee rather than the transferor in a remediation matter). As detailed above, the Section is bound to interpret the State Hazardous Waste Program equivalently to and consistently with the federal RCRA program and programs in other states as a condition of maintaining its authorization. (Ex. P-1).

WASCO represented to the Section that it would be "assum[ing] and perform[ing]" regulatory duties for the Facility beginning in 1999, and the Section was entitled to rely on such representations. 45 Fed. Reg. at 33295, 72026-27. Specifically, employees of WASCO or subsidiaries of WASCO represented in 1999 that WASCO would pursue "a good faith approach in the continued remediation of the [Facility]," including with regard to corrective action and financial assurance. (Exs. B-4, B-5). WASCO acted on these statements between 1999 and 2004 by providing financial assurance in its own name and by shepherding Culligan's regulatory compliance. (Exs. B-1 to B-11; Exs. H-1 to H-15). WASCO then affirmed its direct responsibility for RCRA issues at the Facility in 2004, after Culligan's sale. (See Exs. B-12, B-13). Specifically, rather than disputing the Section's October 2004 email that WASCO was "now responsible for RCRA issues" at the Facility, WASCO executed a Part A permit application as an operator and began conducting post-closure operations. (Exs. D-1, H-16; Ex. J at 809).

Especially since 2004, it is clear that WASCO has had "considerable autonomy to make [major] decisions without [the owner's] involvement," including by contracting with and exercising oversight over its environmental consultant, Mineral Springs, and by dealing directly with the Section concerning compliance-related issues. RO 12174; RO 12952; (and see Exs. B, K, L, M). To the extent WASCO became involved with the Facility voluntarily, such beginnings

do not change the fact that WASCO actually assumed liability and do not preclude the Section from holding WASCO responsible as an operator. RO 11005; NCR Corp., 840 F. Supp. 2d at 1097. The Section properly relied on WASCO's representations of responsibility by dealing with WASCO as an operator for post-closure compliance and financial assurance rather than Anvil. 45 Fed. Reg. at 33295, 72026-27; RO 12703. As a matter of public policy, regulatory certainty is necessary in order for the Section to fulfill its mandate of protecting human health and the environment. See 45 Fed. Reg. at 33169 (referencing the importance of gaining compliance "as quickly as possible"). For all of the above reasons, the Section's characterization of WASCO as an operator is consistent with EPA guidance.

C. The Section's Interpretation of Operatorship Is Consistent with Applicable Case Law, Including a Test Articulated by the Unanimous Supreme Court.

The Section has been unable to locate any North Carolina case law interpreting the meaning of "operator" under the State Hazardous Waste Program, but case law from other jurisdictions reflects an approach consistent with the EPA guidance cited above.

Where a case presents an issue of first impression in North Carolina, it is proper to "look to other jurisdictions to review persuasive authority that coincides with North Carolina's law." Skinner v. Preferred Credit, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005), aff'd, 361 N.C. 114, 638 S.E.2d 203 (2006). As here, "[i]n the event that issues arising in a case pertain to federal statutes, [state courts] are bound by the Supreme Court of the United States' interpretation of the federal statutes involved." Hill v. Stubhub, Inc., 727 S.E.2d 550, 556, __ N.C. App. __, __ (2012), disc. rev. denied, 366 N.C. 424, 727 S.E.2d 550 (2013) (citing R. H. Bouligny, Inc. v. United Steelworkers of Am., 270 N.C. 160, 174, 154 S.E.2d 344, 356 (1967)). By implication, the Supreme Court's interpretation of federal regulations is also binding in state cases involving such regulations. In addition, while not binding, "the holdings and underlying

rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute" or regulation. Id. (quotation marks omitted).

Due to the similarities between the definitions of "operator" under RCRA and another pollution-control statute—the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675—EPA and the courts look to CERCLA case law as further guidance in RCRA operator cases. See, e.g., RO No. 13071 (Oct. 28, 1987) (noting a consistent interpretation of "operator" by the courts under both RCRA and CERCLA); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1574 (5th Cir. 1988) (agreeing that "the relevant statutory definitions in [RCRA] are the same as the definitions in CERCLA")).

In United States v. Bestfoods, the Supreme Court analyzed the meaning of the term "operator" under CERCLA. The Court "rue[d]" the tautological nature of the statutory definition, examined the ordinary meaning of the word "operate," and unanimously concluded:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, ***an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.***

524 U.S. 51, 66-67, 141 L. Ed. 2d 43, 59 (1998) (unanimous) (emphasis added); see also Richardson, 182 N.C. App. at 546-47, 643 S.E.2d at 420-21 (applying Bestfoods in a state case concerning corporate liability).

Without deciding the question of operator liability, the Bestfoods Court noted the existence of "some evidence" in favor of operatorship, including (1) that an agent of the corporation denying operatorship "played a conspicuous part in dealing with the toxic risks emanating from the operation of the plant"; (2) that the corporation "became directly involved in

environmental and regulatory matters through the work of . . . [its] governmental and environmental affairs director"; and (3) that the director "became heavily involved in environmental issues at [the facility] . . . [by] actively participat[ing] in and exert[ing] control over a variety of [the facility's] environmental matters, and [by] issu[ing] directives regarding [the facility's] responses to regulatory inquiries." Bestfoods, 524 U.S. at 72, 141 L. Ed. 2d at 62 (quotation marks and citations omitted).

The District Court for the District of Puerto Rico applied Bestfoods to RCRA, finding an individual liable as a RCRA operator where (1) he acted as the facility's representative in discussions with the state regarding an air quality Notice of Violation; (2) a facility employee deferred to him when questioned by EPA inspectors and another employee would not allow an inspection of the facility without his permission; (3) he authorized an inspection and spoke with EPA inspectors about environmental regulations and a RCRA Information Request; and (4) he signed and certified "under penalty of law" a "Notification of Regulated Waste Activity" form on behalf of the facility. United States v. JG-24, Inc., 331 F. Supp. 2d 14, 75 (D.P.R. 2004), aff'd, 8 F.3d 28 (1st Cir. 2007); see also Envtl. Waste Control, Inc., 710 F. Supp. at 1202-04 (rejecting a claim pre-Bestfoods that a person's signature on an EPA compliance document that "affirmatively identifie[d]" him as an operator in three places "was simply [a] mistake," based on the person's role in the day-to-day operations and financial obligations of a RCRA landfill and because he agreed to indemnify a waste broker from Superfund or cleanup-order liability).

Examining the "broad, passive language" in Bestfoods that an operator "is one who is involved in operations '*having to do with* the leakage or disposal of hazardous waste,'" the Third Circuit held that a corporation and its sole shareholder were "operators" for purposes of CERCLA even though their only activities at the facility "[had] been those necessary to remove

and remediate the soil and groundwater contamination." Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot., 725 F.3d 369, 380-82 (3rd Cir. 2013). The Third Circuit noted that the shareholder-appellant had entered into an agreement with the prior owner to remediate the property in accordance with New Jersey's hazardous waste management program, and to accept financial responsibility for remediation beyond the first $100,000.00. The court emphasized that, "not only did the [operators] have the actual authority to make decisions about compliance with environmental regulations, they hired environmental consultants to conduct tests and remediation operations on the Litgo Property, and they oversaw that work." Id. at 381, 382 n.6.

In another decision applying Bestfoods, the Sixth Circuit held that a township which contracted with a landowner to use a waste dump was an "operator" under CERCLA because, rather than "operating at arm's length with a contractor," it (1) "made repeated and substantial ad hoc appropriations"; (2) "made arrangements (including with the local Junior Fire Department) for bulldozing and other maintenance when [the owner] himself proved unequal to the task"; and (3) "took responsibility for ameliorating the unacceptable condition of the dump, before and after scrutiny from the state government," over a number of years. United States v. Township of Brighton, 153 F.3d 307, 315-16 (6th Cir. 1998).

The District of Kansas found that the president of a corporation, while "two layers removed from the day-to-day supervision of operations," was directly liable under Bestfoods as a CERCLA operator where he participated in weekly meetings that addressed environmental compliance issues, and where "no decisions were made at those meetings without [his] approval." City of Wichita v. Trs. of the Apco Oil Corp. Liquidating Trust, 306 F. Supp. 2d 1040, 1055-56 (D. Kan. 2003). The court emphasized "the frequency of those meetings, and the

fact that [the president] was actively involved in deciding matters of environmental compliance." Id. at 1056.

Here, the record of the Section's course of dealing with WASCO, which spanned 14 years preceding the filing of the petition, is replete with evidence that WASCO "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution" at the Facility, including making "decisions about compliance with environmental regulations." Bestfoods, 524 U.S. at 66-67, 141 L. Ed. 2d at 59. First, WASCO "took responsibility for ameliorating the unacceptable condition" of the Facility as opposed to the owner. Township of Brighton, 153 F.3d at 315-16; (Exs. B-4, B-5, B-12; Ex. D). WASCO "became directly involved in environmental and regulatory matters" through the work of its former Directors of Environmental Affairs, Huerter and Coyne, who "actively participated in and exerted control over a variety of [the facility's] environmental matters," including by issuing "directives regarding [the facility's] responses to regulatory inquiries." Bestfoods at 72, 141 L. Ed. 2d at 62 (quotation marks and citations omitted); (Exs. B; H; L). Coyne and Huerter also signed and submitted regulatory forms for compliance purposes under penalty of law. See G-24, Inc., 331 F. Supp. 2d at 75; Envtl. Waste Control, Inc., 710 F. Supp. at 1202-04; (Ex. D).

Second, WASCO hired and paid for the work of an environmental consultant. Litgo N.J. Inc., 725 F.3d at 381, 382 n.6; (Exs. K, M). Via Mineral Springs and Mineral Springs's subcontractors, WASCO has been the **only** entity operating remediation systems onsite, performing groundwater sampling and reporting, and making decisions about compliance with the post-closure requirements of the State Hazardous Waste Program since 2004, including "repeated and substantial ad hoc appropriations" for post-closure care. Township of Brighton, 153 F.3d at 315-16; (Exs. I, M, N).

Third, as in Litgo, the fact that WASCO's involvement has been limited to post-closure operations rather than active business operations is not a barrier to liability. The Litgo Court expressly rejected the claim that entities "should not be held liable as current operators because they have only managed remedial activities on the site." 725 F.3d at 380-82.

The bottom line is that WASCO made conscious business decisions that it now regrets, making WASCO's actions capricious, not the Section's. The people of North Carolina must not be made to pay for WASCO's whims. WASCO is not a mom-and-pop shop that can legitimately claim ignorance (though strict liability would still exist in such circumstances) but a sophisticated corporate entity with numerous subsidiaries, an employee position that was devoted to environmental affairs between 2004 and 2013, and a former Director of Environmental Affairs (Huerter) whose savviness is reflected by his subsequent rise to Vice President and Senior Counsel. (Ex. J). The 2004 environmental indemnification agreement between WASCO and Culligan's buyer further evidences WASCO's knowledge. (Ex. G-5; Ex. I-21 at 699). WASCO chose to provide financial assurance first on behalf of its former subsidiary and then on its own behalf despite the irrevocability of such instruments, and WASCO affirmatively assumed responsibility for post-closure care and corrective action. WASCO is bound by those choices.

For all of the above reasons, WASCO cannot meet its "heavy burden" of overcoming the presumption that the Section acted in good faith by characterizing WASCO as an operator required to obtain a post-closure permit or AOC in lieu of a permit. Strickland, 194 N.C. App. at 10, 669 S.E.2d at 68 (quotation marks omitted). The Section's interpretation is not clearly erroneous and is entitled to judicial deference. Therefore, this Court should grant summary judgment to the Section on all of WASCO's claims.

III. AS A MATTER OF LAW, WASCO'S PETITION RAISES CLAIMS NOT REDRESSABLE BY THIS COURT.

Should this Court disagree with the Section's preceding arguments, the only proper relief would be a declaration that WASCO is not an operator. To the extent WASCO seeks voidance of public records and the release of its financial assurance, such prayers for relief fall outside the scope of this Tribunal's authority.

A. A Favorable Ruling Would Have No Effect on Public Records that Predate the August 2013 Letter.

First, WASCO seeks an order (a) voiding a Part A permit application dated May 21, 1999 (described by WASCO as a "State Act Identification Form"); (b) voiding a Part A permit application dated November 29, 2004; (c) voiding a Part A permit application dated September 18, 2008; (d) declaring that the Section's letter to WASCO dated January 6, 2010 and its "demands are void"; (e) declaring that the Section's letter to WASCO dated March 14, 2011 and its "demands are void"; and (f) broadly voiding "all other [unspecified] applicable records that incorrectly identify WASCO (and its related entities) as 'operator' of the Site under the Act, the State Rules, or RCRA." (Petition at 5).

Standing is a prerequisite for subject matter jurisdiction. Marriott v. Chatham County, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007), disc. rev. denied, 362 N.C. 472, 666 S.E.2d 122 (2008). The elements of standing are (1) an injury in fact, (2) that is "fairly traceable to the challenged action of the defendant," and (3) that likely "will be redressed by a favorable decision." Id. The Marriott Court held that standing was lacking where the remedies sought by plaintiffs were "unavailable and inappropriate." Id. at 495, 654 S.E.2d at 17. In particular, the trial court only had authority to invalidate portions of a challenged county ordinance but plaintiffs sought to compel the county to enact specific legislation. Id. at 495, 654 S.E.2d at 16-

17. The party invoking subject matter jurisdiction has the burden of proving that jurisdiction exists. Templeton v. Town of Boone, 208 N.C. App. 50, 53, 701 S.E.2d 709, 712 (2010).

A declaration that WASCO is not an operator for purposes of the State Hazardous Waste Program as asserted in the August 2013 Letter would not have the effect of providing redress in the six ways identified above. The forms and letters identified by WASCO are public records that predate the August 2013 Letter. These documents will remain public records no matter the outcome of the contested case. As in the Marriott case, WASCO seeks "unavailable and inappropriate" remedies. Marriott, 187 N.C. App. at 495, 654 S.E.2d at 16-17. Thus, WASCO lacks standing to pursue these claims.

B. WASCO Must Continue to Provide Financial Assurance Unless and Until Another Entity Provides Adequate Substitute Financial Assurance.

Second, WASCO seeks an order obliging the Section "to release the June 2, 2003 **Irrevocable** Standby Letter of Credit . . . as amended." (Petition at 5) (emphasis added). WASCO admits that it voluntarily provided financial assurance for the Facility based on "perceived contractual obligations" rather than any conduct fairly traceable to the Section. (Ex. J at 811). In any event, neither this Court nor the Section has authority to release such financial assurance unless and until another person assumes operator responsibility and, in fact, supplies substitute financial assurance.

Per 40 C.F.R. § 270.40(b) (adopted by reference at 15A NCAC 13A .0113(g)), "the old owner or operator shall comply with the requirements of 40 CFR part 264, subpart H (Financial Requirements) until the new owner or operator has demonstrated that he or she is complying with the requirements of that subpart." The purpose of the financial assurance requirement is to "ensure that sufficient funds are available for . . . post-closure maintenance and monitoring, [and] any corrective action that the Department may require . . . even if the applicant or permit holder

becomes insolvent or ceases to reside, be incorporated, do business, or maintain assets in the State." N.C.G.S. § 130A-295.04.

Regardless of its reasons, WASCO in fact provided a Certificate of Insurance on behalf of its former subsidiary in 1999 and later converted that certificate into an **Irrevocable** Standby Letter of Credit on its own behalf in 2003, which WASCO has updated periodically for inflation. (Ex. H). The express terms of those documents state that they were for "the purpose of compliance with Subpart H of 40 C.F.R. Parts 264 and 265." (Id.).

As a policy matter, the Section cannot know with a reasonable degree of certainty whether another entity regulable as an owner and/or operator will be able to obtain or otherwise provide substitute financial assurance unless and until such event occurs. To release WASCO prematurely from its "irrevocable" commitments would allow the potential for Facility abandonment, which could cause permanent harm to the environment of North Carolina and the health of its people. Based on all of the above, WASCO's prayer for relief as it relates to financial assurance is not redressable by this Tribunal.

CONCLUSION

For the reasons stated above, the Section's interpretation of the State Hazardous Waste Program concerning WASCO's post-closure "operator" status is entitled to deference as a matter of law, and this Court should grant summary judgment to the Section on all of WASCO's claims.

Respectfully submitted this is the 25th day of September, 2014.

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STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 13 EHR 18253

WASCO LLC Petitioner, DYNA-DIGGR LLC Intervenor-Petitioner, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, Respondent.	**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

THIS MATTER came before the undersigned, upon the Motion of Respondent, North Carolina Department of Environment and Natural Resources, Division of Waste Management, for summary judgment under N.C.G.S. § 1A-1, Rule 56, and 26 NCAC 03 .0115(a) and entry of a final decision pursuant to N.C.G.S. § 150B-34.

Having considered the submissions of the parties and the applicable statutes, rules, and legal precedent, the undersigned administrative law judge makes the following findings:

There are no genuine issues of material fact, as the only issue—Petitioner's "operator" liability under the State Hazardous Waste Program—involves a matter of statutory construction, which is a question of law.

Guidance from the United States Environmental Protection Agency, case law from other jurisdictions—including a unanimous opinion of the Supreme Court—and the undisputed facts related to Petitioner's more than 14 years of involvement with the Facility support Respondent's

characterization of Petitioner as an "operator." Because Respondent acted reasonably and based on a permissible construction of the State Hazardous Waste Program, its interpretation is entitled to judicial deference. Petitioner cannot meet its burden of proving that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in interpreting the statutes and rules it was created to administer.

Based on the foregoing reasons, the Section is entitled to judgment as a matter of law. For good cause shown IT IS THEREFORE ORDERED:

1. Respondent's Motion for Summary Judgment is GRANTED.
2. This order constitutes a FINAL DECISION pursuant to N.C.G.S. § 150B-34. Any party wishing to appeal this Order under N.C.G.S. § 150B-45 must file a Petition for Judicial Review in the Superior Court of Wake County or the superior court of the county where the person resides within 30 days after being served with a written copy of this Order.

This the _____ day of _____, 2014.

_____

J. Randolph Ward
Administrative Law Judge
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing MOTION FOR SUMMARY JUDGMENT, MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, and PROPOSED ORDER have been served on the parties to this action by depositing the same in the United States mail, first class and postage prepaid, and addressed to the parties' counsel of record as follows:

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This the 25th day of September, 2014.

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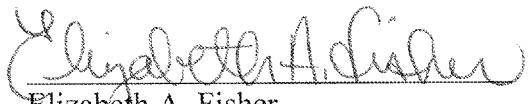

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